IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :
THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 23RD MAY 2007 / 2ND JYAISHTA 1929

SA.No. 487 of 1993()

AGAINST THE ORDER DATED 20/08/1992 IN OS 152/88 IN
AS.28/1991 of SUB COURT, SULTHAN BATHERY
OS.152/1988 of MUNSIFF COURT, KALPETTA
.....

APPELLANT: (RESPONDENTS IN AS.28/91 OF THE SUB COURT,
---------- **SULTHAN BATHERY AND DEFENDANTS IN OS. 152/1988 OF THE MUNSIFF'S COURT, KALPETTA.**

1. **NELLARA KESAVAN, S/O.NOONCHI,**
   THOMATTACHAL AMSOM AND DESOM,
   SULTHAN BATHERY TALUK.

2. **CHIRUTHA, W/O. NELLARA KESAVAN,**
   THOMATTACHAL AMSOM AND DESOM,
   SULTHAN BATHERY TALUK.
3. **THAMPI, S/O.NELLARA KESAVAN,**
   THOMATTACHAL AMSOM AND DESOM,
   SULTHAN BATHERY TALUK.

4. **NELLARA DHARMAN, THOMATTACHAL AMSOM AND DESOM, SULTHAN BATHERY TALUK.**

BY ADV. SRI R D SHENOI
SMT.SUSHEELA R.BHATT

RESPONDENTS: (APPELLANT IN THE APPEAL AND PLAINTIFF IN THE
---------- -------- **SUIT)**

NELLARA NARAYANAN, S/O. EAPEN,
AMBALAVAYAL AMSOM AND DESOM,
SULTHAN BATHERY TALUK.

BY ADV. SRI GIRI V

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 23/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP. NO.1177/1993 IN SA. NO.487/1993

DISMISSED

23.05.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

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M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 487 OF 1993

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DATED THIS THE 23RD DAY OF MAY, 2007

JUDGMENT

Defendants in O.S.152 of 1988 on the file of Munsiff Court, Kalpetta are the appellants. Plaintiff therein is the respondent. Respondent instituted the suit seeking a decree for recovery of possession of the plaint schedule property on the strength of title, from appellants. Plaint schedule property is 78 cents in R.S.No.117 of Thomattachal village. Admittedly plaint schedule property was obtained by Nellara Kandan from the Government. Under Ext.A1 registered possessory mortgage deed 2094/1963, Nellara Kandan mortgaged the property in favour of the respondent for a period of ten years and put him in possession of the property. Respondent claimed title to the plaint schedule property under Ext.A1. Contending that appellants trespassed into the property and obtained unlawful possession of the property, a decree for recovery of possession was sought for. Appellants filed a written statement admitting that the property was obtained by Nellara Kandan from the Government. It was contended that Nellara Kandan was the Moopan of the Adivasi colony and the grant was in favour of the appellants and

respondent has no title to the plaint schedule property.

2. The learned Munsiff framed the necessary issues. On the evidence of PW1, DW1 and Exts.A1 to A5, learned Munsiff dismissed the suit holding that Ext.A1 was only a copy of the mortgage deed and without producing the original mortgage deed, respondent is not entitled to the decree sought for. Respondent challenged the decree and judgment before Sub Court, Sultan Battery in A.S. 28 of 1991.

3. Before the first appellate court, respondent produced the original or Ext.A1 which was received in evidence. The learned Sub Judge, on the evidence, found that under Ext.A1, respondent has title to the plaint schedule property and appellants have no right to continue in possession of the property and therefore granted a decree for recovery of possession on the strength of title. The second appeal is filed challenging the decree for recovery and possession granted by learned Sub Judge.

4. Though notice was ordered, no substantial question of law was formulated.

5. The arguments of learned counsel appearing for appellants was that the plaint schedule property originally belonged to the Government and even according to respondent, it was obtained as per a grant by government to Nellara Kandan, the Adivasi Moopan and under Section 3 of Government Grants

Act 1895, all provisions, restrictions, conditions and limitations contained in any such grant or transfer of government land shall be valid and take effect and Nellara Kandan is therefore not entitled to transfer the property or encumber the same as has been done under Ext.A1 and hence respondent is not entitled to claim title under Ext.A1. Relying on Section 2 of the said Act, learned counsel argued that the provisions of Transfer of Property Act has no application in respect of a grant of government land by virtue of the Act and as Nellara Kandan had no right to transfer the property and respondent, as a transferee is not entitled to claim title to the property and therefore decree and judgment are to be set aside.

6. Learned counsel appearing for the respondent argued that the title of Nellara Kandan was admitted by the appellants themselves and before the courts below no contention was taken that Nellara Kandan had no right to transfer or encumber the property and therefore respondent has no title to the property and such a contention cannot be raised for the first time in the second appeal and therefore the appeal is only to be dismissed.

7. Even according to appellants, the plaint schedule property was originally a government land and was obtained by Nellara Kandan as per a patta granted by the government. True, under Section 2 of Government Grants Act, 1895 the provisions

of Transfer of Property Act shall not apply to the government land transferred under the provisions of the said Act. It is also true that Section 3 of the Act enables the government to impose any restriction or condition and limitation, while granting transfer of government land and such restrictions, conditions and limitations will be binding. But as rightly pointed out by learned counsel appearing for respondent, before the courts below, appellants did not raise a contention that the grant in favour of the respondent contains any restriction, condition or limitation whereunder Nellara Kandan is incompetent or prohibited to transfer or encumber the property as has been done under Ext.A1. Therefore, in the absence of pleading, appellants are not entitled to raise such a contention for the first time in the second appeal. Therefore in the absence of proper pleading and factual foundation, appellants are not entitled to challenge the decree and judgment on that ground.

8. Whatever it be, even if it is taken that appellants are entitled to raise such a contention, if they are to succeed in appeal, appellants have to establish that the grant contained a restriction or limitation which disentitle Nellara Kandan from transferring the property in favour of the respondent. There is no evidence to prove that there was any restriction or condition and limitation prohibiting the transfer of property or creating

any encumberance in the property. Therefore appellants are not entitled to contend that Ext.A1 is vitiated or is invalid. Under Ext.A1, Nellara Kandan had cretated a possessory mortgage in favour of respondent and put respondent in possession of the property. Respondent is admittedly an Adivasi. Hence even if there was any restriction to transfer the property to a non adivasi that also will not be applicable. As rightly found by learned Sub Judge, respondent has title to the plaint schedule property under Ext.A1. Appellants have no better title and they have no right to continue in possession of the property. In such circumstances, decree for recovery of possession granted by courts below is perfectly correct. I find there is no substantial question of law involved in the appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.487/1993

JUDGMENT

23.5.2007